

JD-49-16  
PHOENIX, AZ

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

SHAMROCK FOODS COMPANY

and

CASES 28-CA-161831  
28-CA-162851  
28-CA-165951

ANDRES CONTRERAS, an Individual

BAKERY, CONFECTIONERY, TOBACCO  
WORKERS' AND GRAIN MILLERS  
INTERNATIONAL UNION, LOCAL UNION  
NO. 232, AFL-CIO-CLC

*Nestor M. ZarateMancella, Esq. and Sara Demirok, Esq.,*  
for the General Counsel.

*Todd A. Dawson, Esq. and Nancy Inesta, Esq.*  
*(Baker & Hostetler LLP)*, of Cleveland, Ohio and  
Los Angeles, California, for the Respondent.

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*(Weinberg, Roger & Rosenfeld)*, of Alameda, California,  
for the Charging Party.

DECISION

Statement of the Case

**KELTNER W. LOCKE, Administrative Law Judge.** Credited evidence fails to establish either that the Respondent knew about the union activities of the alleged discriminatees or the existence of antiunion animus. Therefore, I recommend that the complaint be dismissed in its entirety.

### Procedural History

5 This case began on October 13, 2015, when Andres Contreras, an individual, filed an unfair labor practice charge against the Respondent, Shamrock Foods Company, with Region 28 of the National Labor Relations Board, which docketed the charge as Case 28-CA-161831.

10 On October 28, 2015, Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC (the Union) filed an unfair labor practice charge against the Respondent. The Region docketed this charge as Case 28-CA-162851.

On December 11, 2015, the Union filed a charge against Respondent which was docketed as Case 28-CA-165951. The Union amended this charge on January 28, 2016.

15 On December 30, 2015, the Regional Director for Region 28, acting for and pursuant to authority delegated by the Board's General Counsel (the General Counsel), issued a complaint and notice of hearing in Case 28-CA-161831. The Respondent filed a timely answer.

20 On January 29, 2016, the Regional Director issued an order consolidating complaint, consolidated complaint and notice of hearing in Cases 28-CA-161831, 28-CA-162851, and 28-CA-165951. (References below to the complaint or the consolidated complaint pertain to this pleading.) The Respondent filed a timely answer.

25 On March 8 and 11, 2016, the General Counsel filed notices of intent to amend the complaint at hearing.

30 On March 15, 2016, a hearing opened before me in Phoenix, Arizona. The General Counsel did not seek to amend the complaint to conform to the March 8, 2016 notice of intent, but did move to amend the complaint as specified in the March 11, 2016 notice of intent to amend. I granted that motion and the General Counsel's motions later in the hearing to allege that two additional individuals were Respondent's supervisors and agents.

35 The parties presented evidence on March 15-18, 21-22, 2016, and, by videoconference, on April 27, 2016. After an adjournment, the hearing resumed for oral argument by telephone conference call on May 13, 2016. It then closed.

### Admitted Allegations

40 In its answer and by stipulations at the hearing, the Respondent has admitted a number of allegations raised by the complaint. Based on those admissions, I make the findings discussed in this section of the decision.

Respondent's answer admits that it has received copies of the unfair labor practice charges described in complaint paragraphs 1(a), (b), (c), and (d) but it has denied, for lack of knowledge, that those charges were filed and served on the dates alleged. However, the record includes a copy of each charge together with an affidavit of service describing when and how the charge was served. The Respondent has not challenged the accuracy of these documents or offered any evidence to rebut the presumption of administrative regularity. Therefore, I conclude that the General Counsel has proven that the charges were filed and served as alleged.

The Respondent has admitted that it is a corporation engaged in the wholesale distribution of food products with an office and place of business in Phoenix, Arizona, as alleged in complaint paragraph 2(a). It also has admitted the commerce allegations raised in complaint paragraphs 2(b) and (c). Based on these admissions, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it meets the Board's jurisdictional standards.

During the hearing, the Respondent stipulated that the Union was a labor organization within the meaning of Section 2(5) of the Act. I so find.

Complaint paragraph 4 alleges that certain named individuals were, at all material times, the Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. The Respondent has admitted some but not all of these allegations. Based on the Respondent's admissions, I find that the following individuals were, as alleged, its supervisors and agents: Warehouse Operations Manager Ivan Vaivao; Warehouse Manager Jeff Vandawalker; Warehouse Supervisors Leland Scott and Anthony Urias; and Operations Supervisor Frankie Valenzuela.

During the hearing, the General Counsel amended Complaint paragraph 4 to allege that Leave Administrator Mary Fountain and Human Resources Manager Heather Vines-Bright were Respondent's supervisors and agents. Respondent denied that Fountain met the statutory definitions but admitted the supervisory status of Vines-Bright. Based on Respondent's admission, I find that at all material times, Human Resources Manager Vines-Bright was a supervisor of the Respondent within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act.

The Respondent has admitted that on about October 22, 2015, it removed its employee Benny Saenz from its modified duty program, as alleged in paragraph 6(c) of the amended complaint. I so find.<sup>1</sup>

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<sup>1</sup> The Respondent denies the remaining allegation in complaint par. 6(c), that its removal of Saenz from the modified duty program caused Saenz a loss of work.

Paragraph 6(d) of the complaint, as amended, alleges that about November 30, 2015, Respondent suspended employee Kevin Owens. Respondent has admitted suspending Owens on this date and I so find. Additionally, based on Respondent's further admissions, I find that Respondent discharged Owens on about December 4, 2015, as alleged in paragraph 6(e) of the amended complaint.

The Respondent has admitted the allegations raised in paragraphs 6(f) and (f)(2) of the complaint, as amended. Based on these admissions, I find that on about January 18, 2016, the Respondent placed employee Benny Saenz on extended medical leave under the following conditions: (1) Saenz would not be guaranteed a return to his former position and must apply to any open position with Respondent for which Saenz qualifies; and (2) Saenz' group medical insurance would remain in effect for a 2-month period, with the associate's [employee's] share of the monthly contribution being deducted from Saenz' pay during that period.<sup>2</sup>

### Withdrawn Allegations

The General Counsel amended the complaint to withdraw paragraph 5(a). Accordingly, I make no findings regarding the allegations previously raised in this paragraph.

### Disputed Unfair Labor Practice Allegations

The Respondent denies that it committed any unfair labor practices and also, therefore, denies the legal conclusion set forth in complaint paragraph 9, which states that the alleged unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act. The unfair labor practice allegations will be discussed below in the order they appear in the complaint, as amended. Because the General Counsel has withdrawn complaint paragraph 5(a), I begin with paragraph 5(b).

#### Complaint Paragraph 5(b)

The allegations in this paragraph concern the Respondent's distribution of orange "high visibility" shirts which bore the words "We Are Shamrock." Complaint paragraph 5(b) alleges that, by distributing these shirts, the Respondent violated the Act in three ways.<sup>3</sup>

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<sup>2</sup> The Respondent has denied the allegation, raised in par. 6(f)(3) of the amended complaint, that Saenz' extended medical leave was also subject to a further condition. As described above, during the first 2 months of Saenz' extended medical leave, he continued to be covered under the group medical insurance plan and Saenz' share of the monthly contribution would be deducted from his pay. Complaint par. 6(f)(3) alleged that if Saenz were unable to return to work following the end of this 2-month period, his group medical insurance would "remain in effect for a period not to exceed a maximum of twelve months inclusive of all leaves, with the entire cost of the monthly contribution being paid by Saenz during that period."

In addition to denying complaint par. 6(f)(3), the Respondent added "by way of further response. . .that the associate can continue COBRA coverage for longer than 12 months."

<sup>3</sup> The record establishes without contradiction that the Respondent did distribute such shirts, so that fact is not in

More specifically, complaint paragraph 5(b) is divided into subparagraphs alleging that the distribution of these shirts (1) constituted an unlawful grant of benefits to employees during a union organizing campaign to discourage them from supporting or voting for the Union; (2) constituted an unlawful interrogation of employees concerning their union membership, activities and sympathies; and (3) created among employees an impression that their union activities were under surveillance by Respondent.

Paragraph 6(h) of the complaint, as amended, alleges that the Respondent took these actions because its employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint paragraph 7 alleges that the Respondent thereby violated Section 8(a)(1) of the Act. Respondent denies all of these allegations.

Subparagraph 5(b)(1)

In considering the Government's first theory of violation—that Respondent unlawfully granted a benefit to employees when it gave them the shirts—I will be guided by a well-established principle: A grant of benefits made by an employer during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election.

The employer bears the burden of proving that it would have conferred the same benefit in the absence of the union organizing campaign. To meet this burden, the employer needs to establish that the benefits conferred were part of a previously established company policy and the employer did not deviate from that policy on the advent of the union. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004).

Warehouse Manager Ivan Vaivao credibly testified that the Respondent gave these shirts to employees to commemorate a successful season. The shirts also furthered a policy which Respondent had instituted earlier in the year which required employees to wear high visibility clothing while in the warehouse. Photographs of one such shirt are in evidence and the bright orange color certainly would be conspicuous at a distance.

The record includes both testimony that Respondent had given employees shirts on many previous occasions and photographs of such shirts. Based on this evidence, I conclude that the Respondent did have a previously-established policy of giving commemorative shirts to employees and that providing them the "We Are Shamrock" shirts did not deviate from this tradition.

Each time the Respondent issued a commemorative shirt, it had a unique design. The only obvious differences between those previous shirts and the "We Are Shamrock" shirts are that, in

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dispute. Controversy arises concerning the lawfulness of this action.

keeping with the newly adopted high visibility policy, the latter shirts invite attention. The shirts are made of this different material, that does not make them materially different from shirts the Respondent gave employees in the past.

5 In sum, I conclude that Respondent's gift of the "We Are Shamrock" shirts to employees does not deviate from its past practice. Therefore, I conclude that the Respondent did not unlawfully grant a benefit when it gave the shirts to employees.

Subparagraph 5(b)(2)

10 Complaint paragraph 5(b) further alleges that Respondent's distribution of the shirts to employees constituted a form of interrogation. This theory might well be plausible in some circumstances. For example, if the lettering on the shirt proclaimed an antiunion message or if a supervisor told an employee that wearing the shirt signaled opposition to the Union, then the employee's reaction indeed would reveal his or her attitude about the Union. The gift would ask a question and the employee's acceptance or rejection of it would provide the answer.

15 However, those circumstances are not present in this case. The lettering on the shirt itself states "We Are Shamrock," with no reference to the Union. Moreover, credible evidence does not establish that any supervisor ever made a statement to an employee which identified the shirt as an antiunion symbol. In the absence of evidence showing that employees understood, or reasonably would understand, that the shirt signified opposition to the Union, there is no basis to find that giving or offering to give an employee the shirt amounted to a question in disguise.

25 The Government argues that "after the Union organizing committee sprang into action in late April and early May of 2015, a group of employees began wearing orange T-shirts around the Respondent's Phoenix warehouse." According to the General Counsel, they did so to show their opposition to the union organizing campaign. When the Respondent later gave employees the orange "We Are Shamrock" shirts, the Government reasons, the employees would have identified those orange shirts with the ones worn earlier by the antiunion employees.

30 To support this theory of violation, the Government must make some showing that employees understood or reasonably would understand that wearing an orange shirt constituted a statement of opposition to the Union. During oral argument, the General Counsel cited testimony that normal attire in the warehouse "included black or gray shirts with Respondent's logo." Even if that assertion is true, it does not establish that wearing an orange shirt carried an antiunion message. The General Counsel further argued:

40 These [antiunion] employees continued wearing their own shirts up through July. The orange T-shirts were intended to stand out and send a message to warehouse employees that not every employee was in favor of the organizing campaign.

This assertion constitutes argument, not evidence. The argument's premise—that employees who wore orange shirts intended thereby to signal their opposition to the Union—must be proven and not simply assumed. The General Counsel's oral argument continued:

5           Now, in an attempt to distance themselves from the employees that used their own orange garments or orange shirts, Respondent's supervisors testified incredibly that they had no direct knowledge about the particular group of employees who wore their own shirts during the night shift that they supervised.

10           However, to argue that a witness "testified incredibly" is not the same thing as offering a reason to disbelieve the testimony, let alone evidence contradicting the testimony. The General Counsel does argue that Supervisor Leland Scott "knew the orange shirts worn by that group of employees were worn to send a specific message that they were against the Union, and they did not want to be approached." Scott testified, in part, as follows:

15           Q.     When did you notice a group of loaders wearing -- I think they were like non-reflective orange shirts.  
          A.     Right. I don't recall a specific time. You know, I don't know exactly when I noticed them. You know, it was an orange  
20           shirt, so that was it.

          Q.     But that was before the company barbecue, right?  
          A.     Again, I can't recall exactly when it was those guys started wearing their orange shirts.

25           Q.     But you know why they started wearing those shirts, right?  
          A.     I have my understanding, I guess. I don't -- you know, I'm not sure. But --

30           Q.     In fact, you talked to one of those loaders. Was it Leo Baeza about that? Didn't you?  
          A.     Did I talk to Leo?

          Q.     Uh-huh.  
35           A.     I talked to -- did I talk to Leo? I don't recall talking to Leo.

          Q.     But you did talk to some of those employees about it, right?  
          A.     I talked to employees about wearing HiVis [high visibility] shirts. That's what I talked to employees about.

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The General Counsel called Leo Baeza as a witness but did not ask him any questions about Leland Scott, and Baeza did not testify about any conversation with Scott. Therefore, there is no reason to doubt Scott's testimony that he did not recall talking to Baeza.

Another person employed as a loader, Marvin Woods, testified that he received an orange shirt from Scott, but Woods' testimony does not suggest that Scott said anything about the shirt being similar to that worn by employees who were against the Union or who did not wish to be solicited to sign an authorization card.<sup>4</sup> Additionally, Woods' testimony neither mentions any group of employees wearing orange shirts nor indicates that Woods associated wearing an orange shirt with antiunion sentiment.<sup>5</sup>

Woods' testimony does not support the General Counsel's argument that employees understood that wearing an orange shirt signaled that the wearer was not interested in discussing the Union. However, Scott's testimony does indicate that Scott believed that to be the case. In the following testimony,<sup>6</sup> Supervisor Scott refers to the orange shirts which some employees had worn before the Respondent gave out the "We Are Shamrock" shirts:

Q. BY MS. DEMIROK: They were wearing the shirts to show that they did not support the Union, right?

A. My understanding was that they were wearing the shirts not to be harassed. To be left alone. You know, "I don't want to be

<sup>4</sup> Woods testified that in July 2015, when he returned to work after having surgery, Scott gave him an orange shirt and said "You didn't make it to the meeting, so you should try—you should put this on. You basically should wear this."

<sup>5</sup> Woods began work for the Respondent in August 2013. Presumably, he would have been aware of any widespread belief among employees that wearing an orange shirt carried an antiunion connotation. Woods supported the Union and the complaint alleges that Respondent discriminated against Woods in violation of Sec. 8(a)(3) of the Act. Therefore, it would have been in his interest to give testimony suggesting that the orange "We Are Shamrock" shirts manifested an antiunion motive. Moreover, he testified on behalf of the General Counsel, who presumably would have tried to elicit such testimony if it were true. The fact that Woods did not give such testimony must be considered in deciding whether employees believed that wearing an orange shirt signified an antiunion attitude.

<sup>6</sup> In weighing the import of this testimony, it may be noted that here I am considering the General Counsel's theory that giving out the shirts constituted *interrogation*, not the theory that they were a grant of benefit, discussed above, and not the theory that this action created an impression of surveillance, discussed below. To establish that giving an orange shirt to an employee amounted to asking the employee about his union sympathies, the Government necessarily must show that the recipient believed, or reasonably would believe, that the shirt conveyed a message about the Union and that wearing the shirt would manifest approval of that message.

More exactly, the General Counsel does not have to prove that any particular employee receiving the shirt held such a belief, but only that such a belief was common enough among employees that it would be reasonable for a typical employee to associate an orange shirt with an antiunion message which would be endorsed by wearing it. Supervisor Scott did not explain how he came to believe that employees who had worn orange shirts were thereby signaling that they did not wish to be bothered about the Union. Therefore, his testimony sheds no light on how employees regarded the shirts.

questioned, or asked, or given anything.” You know, “I just want to work and go home.”

Q. Harassed by Union’s organizers, right?

A. By anybody. You know, they’re —they just want to do their job and go home. That’s it.

Q. Well, there was a lot of talk about harassment in the warehouse, but that was in terms of employees getting approach to sign union cards, right?

A. I don’t know specifically. All I know is that they just wanted to say hey, I’m here to work and I don’t want to be bothered. So whether that was by either side, I don’t know.

Q. But those employees didn’t support the Union, right?

A. Again, I don’t ask anybody. I don’t know.

This testimony does indicate that at least one supervisor, Scott, believed that the employees who had come to work in orange shirts were thereby announcing ”don’t bother me.” However, the Government must prove that *employees* believed that the workers who had worn those orange shirts were signaling their lack of interest in signing a union authorization card or talking about the Union. The complaint alleged, the Respondent has admitted and I have found that Scott is a supervisor, not an employee. His testimony about his own belief does not suffice. Moreover, his testimony does not reveal the source of that belief.

Only if an employee had such a belief and only if he believed that other employees shared it, would his eagerness or reluctance to accept the gift of a shirt reveal anything about his support or lack of support for the Union. Only then would the presentation of a shirt put him “on the spot” and force him to reveal how he felt about the Union.

To be precise, the General Counsel must show that employees reasonably would believe that wearing a “*We Are Shamrock*” shirt, one of the shirts given out by the Respondent, signaled lack of support for the Union. Proving that employees believed that the *earlier* orange shirts conveyed such a message would not establish that employees held the same belief about the “We Are Shamrock” shirts. Respondent had a long practice of giving commemorative shirts to its employees and in each instance the shirt bore a design and colors different from its predecessors. Because of this tradition, employees would not regard receiving a free shirt as unusual. Moreover, because the lettering on the “We Are Shamrock” shirts said nothing about the Union, it cannot simply be assumed that employees would associate these shirts with the union organizing campaign.

The General Counsel disputes that the “We Are Shamrock” shirts were “commemorative” shirts like those given in the past. To distinguish the “We Are Shamrock” shirts, the Government

points to timing. At a barbecue for employees on June 4, 2015, the Respondent had given employees hats with the lettering “Shamrock Pride” but it did not give them the “We Are Shamrock” shirts until a month later.

5 However, the record does not establish that the Respondent had a practice of only giving out commemorative shirts at a June barbecue. Employees reasonably would regard the shirts as commemorative even though they received them a month later.

10 The General Counsel also argues that the Respondent did not have to give the employees orange shirts because, as subpoenaed documents indicate, another color was available. During oral argument, the Government inferred much from Respondent’s insistence on the color orange:

15 Now, Respondent claims that the orange color was just a coincidence and that it was the only color available in the HiVis and DriFit option from the supplier. This is in transcript 969. However, email messages between Respondent and the shirt supplier contradicts Respondent's claim and demonstrates that orange was not the only color available. And this is in GC Exhibit 18 and 19. Notably, Respondents specifically requested orange shirts, and explained in an email that, we want HiVis<sup>7</sup> orange, not green.

20 General Counsel’s citation of transcript page 969 refers to part of the testimony of Respondent’s warehouse operations manager, Ivan Vaivao. The General Counsel attributes to Vaivao a statement that orange was “the only color available in the HiVis *and* DriFit option from the supplier.” (I have italicized “and” to make clear that Respondent had two conditions, both of which had to be satisfied: The shirt must be high visibility and it also must be Dri-Fit.)

30 In other words, the General Counsel interprets Vaivao’s testimony to say that Respondent purchased orange shirts because the only shirts available which satisfied both conditions—high visibility *and* Dri-Fit—were orange. Then, the General Counsel cites two documents to disprove this claim. According to the Government, these emails establish that the vendor also had green shirts which were both high visibility and Dri-Fit.

35 However, I do not understand Vaivao’s testimony to mean what the General Counsel asserts. The cited transcript page includes the following:

Q. BY MR. DAWSON: Okay. And why was it, why did the company buy orange?

A. We wanted, the reason why was [Operations Manager] Jerry [Kropman] wanted a comfortable shirt and our vendor didn't

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<sup>7</sup> High visibility.

have the DriFit in the other colors so that's the reason why we got the DriFit. The reason why it was orange is because we wanted a shirt for what it was intended for. Right? There's a date line, there's a time line that we wanted the shirts for. That was the quickest that we could get those shirts in that DriFit material.

One part of this confusing testimony—"our vendor didn't have the DriFit in the other colors"—does seem to accord with the General Counsel's interpretation. It appears to be an explanation for why the Respondent bought orange shirts. But there is a problem.

After hearing Vaivao state that the vendor did not have the DriFit shirts in other colors, one naturally would expect him to complete the sentence with the words "therefore we bought orange shirts." However, Vaivao did not finish the sentence in that logical way but instead said "that's the reason why we got the DriFit." Whatever that sentence might mean, it does not say that Respondent bought orange shirts because that was the only high visibility color available in DriFit.

Could Vaivao simply have mispoken? Might he have intended to say "that's the reason why we got orange" but, due to nervousness or some other reason, have substituted the word "DriFit" instead? That seems unlikely because, in the next sentence, he offers an explanation for purchasing orange shirts. Presumably, he would not have given this explanation for the color if he had already provided an explanation for the color.

In sum, I conclude that Vaivao did not say that Respondent bought orange shirts because the only available high visibility DriFit shirts were orange. Therefore, I do not find that the emails contradicted or impeached his testimony.

The emails do establish that the vendor notified Respondent that it could purchase high visibility shirts in either green or orange and that Respondent replied that it wanted orange. However, the emails fall short of demonstrating that both the orange and green shirts were DriFit.

Moreover, I hesitate to read too much into the Respondent's desire to buy orange shirts rather than green. The Respondent might have preferred the color orange for any number of reasons unrelated to the union organizing drive and no evidence establishes that this campaign affected the choice of color.

As noted above, credible evidence falls short of establishing that some employees in the warehouse wore orange shirts to signal that they did not want to be solicited on behalf of the Union. However, even assuming for the sake of analysis that some employees did wear orange shirts for this reason, no evidence establishes that the managers who chose the "We Are Shamrock" shirt color even knew about it.

The Government's theory involves a claim that warehouse employees had worn orange shirts to signal that they did not wish to be bothered about the Union and also the claim that management chose orange for its "We Are Shamrock" shirts so that employees would associate those shirts with the putatively antiunion orange shirts. It has failed to carry its burden of proving either claim.

The General Counsel's theory of violation—that giving employees orange shirts constituted unlawful interrogation B also involves another factual question: Would employees reasonably believe that accepting and wearing a "We Are Shamrock" shirt expressed a sentiment for or against the Union?

Leland Scott's testimony, quoted above, establishes that he believed employees had worn orange shirts to signal "don't bother me" during the union organizing campaign. However, Scott is a supervisor, not an employee, so his own views do not resolve the issue of what employees thought.

One employee, Kevin Owens, referred to the "We Are Shamrock" shirts as "shirts for people that are anti-Union." He testified, in part, as follows:

Q. Now, Mr. Owens, you stated that you overheard other employees talking about shirts. Did you ever go to anyone specifically to talk about these shirts?

A. It was a Monday, I was on the loading dock, I got tired of hearing people's ideas of the shirt. So I went and asked—I asked floor captain David Cruz, are these shirts intended for people that are anti-Union. No one was around. He said yeah. I asked where could I get some. He sent me to Cory Pedroza's office on the loading dock. I asked Cory if he had some. He said no. He walkie-talkied Leland Scott on the walkie talkie and asked if he had any more of these shirts. Leland Scott said yes, send him up to the conference room where the supervisors offices are. It's a—the dock—the loading dock is like where all —where they load all the trucks and all that stuff.

Cruz denied telling any employee that the "We Are Shamrock" shirts were for antiunion employees. Therefore, I must resolve the conflict in the testimony by deciding which is more reliable.

In assessing whether a particular witness has given trustworthy testimony, it is appropriate to consider whether any part of his entire testimony has been contradicted by other evidence. Proof that one part of the testimony is inaccurate raises questions about the remainder of the testimony.

Such a contradiction does appear in a portion of Owens' testimony not related to that quoted above, but the inaccuracy does cast doubt on the reliability of the quoted testimony. The problematic, doubt-producing testimony concerns events on October 11, 2015, which resulted in Owens receiving a disciplinary warning 2 days later.

On direct examination, Owens testified that Cruz had instructed him to go to a different department to perform work, that he went there, saw that no work was being done and left. However, on cross-examination, Respondent's counsel showed Owens the affidavit Owens had given during the unfair labor practice investigation:

Q. No? Okay. Now let's talk, too, about that discipline that I think was General Counsel Exhibit 30, right? And I think you testified that that—you were given that because Cruz asked you to go to a different department, right?

A. Yes.

Q. That's not what you told the Board, is it? Is that true, you didn't tell the Board that, did you?

A. Yeah, it came from David Cruz.

Q. You did? Okay. Well, let me show you page 8, paragraph 22 of your affidavit. It says, "In about September/October I was written up for insubordination after Scott told me to go to a different area?" Did I read that correctly?

A. Yes, you did.

Additionally, there is another inconsistency in Owens' testimony. It concerns the reason why, at another time, he threw away 71 shipping labels. This matter will be discussed below in connection with the allegations raised in complaint paragraphs 6(d) and (e) concerning Owens' suspension and discharge.

These specific inconsistencies buttress my overall impression that Owens was somewhat partisan as a witness. However, I do not have similar reservations about Cruz' testimony. Therefore, to the extent that Owens' testimony conflicts with that of Cruz, I credit Cruz. Accordingly, I find that Cruz did not tell any employee that the "We Are Shamrock" shirts were for employees who opposed the Union.<sup>8</sup>

<sup>8</sup> Because the General Counsel has not proven that Cruz made the statement which complaint paragraph 5(c) alleges that he made, it is not necessary to reach the issue of whether Cruz is Respondent's supervisor or agent. However, in case the Board should disagree with my finding that Cruz did not make the statement, and also because Cruz' status is relevant to other complaint allegations, I will address here the allegation, denied by Respondent, that Cruz meets the statutory definition of supervisor.

The Act defines "supervisor" to mean "any individual having authority, in the interest of the employer,

No credible evidence establishes that any of Respondent's supervisors or agents made a

to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11).

Thus, to warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

In his work as a "crossdock captain" (sometimes referred to simply as "captain"), Cruz performs various tasks to assure that trucks are loaded efficiently and quickly. He described them as follows:

- Q. Could you describe for us what your duties are as a cross dock captain?
- A. Yes. To make sure the pickers don't fall behind, the throwers don't fall behind and make sure that I get the cases to a truck before their departure time.
- Q. Can you explain what you mean by to make sure that throwers and pickers do not fall behind?
- A. Yeah. If an area, if a certain area is falling behind and another area is ahead, I have to move bodies from one area to the other.
- Q. Do you do this regularly during the course of your workday?
- A. Yes.
- Q. And about how many times do you do this every day?
- A. I don't recall.
- . . . .
- Q. And, Mr. Cruz, how do you go about ensuring that pickers and throwers don't fall behind?
- A. I have to move pickers from one area to the other if they're falling behind.
- Q. And is this a decision that you need to make on the fly?
- A. Yes.

However, Cruz also testified that he performs the same work as other employees, picking and throwing cases, and never worked without a supervisor being present. Additionally, Cruz testified that he did not have authority to hire, suspend, lay off, recall, promote, discharge, discipline, reward, grant or approve time off, call someone in to work, or send an employee home. The record also does not establish that Cruz could effectively recommend such actions.

Sometimes, Cruz did direct employees in their work and presumably he did so in the interest of Respondent. However, the General Counsel also bears the burden of proving that Cruz' direction of employees was not of a merely routine or clerical nature but required the use of independent judgment. The record does not establish that Cruz' direction of other workers was other than routine and I cannot conclude that he exercised independent judgment. Accordingly, were I to reach the issue of Cruz' supervisory status, I would find that he did not meet the statutory definition.

Further, the record does not establish that the Respondent took any action to make Cruz its agent or to create the appearance that Cruz was acting as its agent. Considering that Cruz performed the same work as other employees, in addition to the special duties assigned to a "captain," I conclude that employees reasonably would not believe that Cruz was speaking or acting for Respondent. Therefore, I further conclude that Cruz was not an actual or apparent agent of Respondent.

statement to employees that reasonably would lead them to believe that the “We Are Shamrock” shirts were “for people that are anti-Union.” I find that they did not.

5 Based on the entire record and particularly the testimony of Warehouse Operations Manager Vaivao, which I credit, I find that the Respondent gave “We Are Shamrock” shirts to all employees who wanted them, did not deny any employee’s request for a shirt and did not prohibit any employee from wearing a shirt. Applying an objective standard and considering the totality of circumstances, and notwithstanding Owens’ subjective impression that these shirts were “for people who were anti-Union,” I find that an employee would not reasonably believe that accepting or wearing a “We  
10 Are Shamrock” would express an opinion about that employee’s union sentiments.

Because an employee would not reasonably believe that accepting or wearing a “We Are Shamrock” shirt would signify opposition to the Union and similarly would not reasonably believe that rejecting or failing to wear the shirt would signify support for the Union, the employee’s decision  
15 to accept or decline the shirt would not be based on his sentiments for or against the Union. Therefore, his choice to accept or reject the shirt would not reveal to anyone else how he felt about the Union.

Since how the employee reacted to being given or offered the shirt would not reveal his union sympathies or antipathies, giving or offering to give him a shirt would not constitute asking the question. Therefore, I conclude that no interrogation took place.

In view of my finding that there was no interrogation, it isn’t necessary to consider whether the alleged interrogation was lawful or unlawful. However, in case the Board should reject my  
25 finding that no interrogation took place, I will analyze the facts using the Board’s framework for determining whether questioning was or was not coercive.

In deciding whether interrogation is unlawful, I am guided by the Board’s decision in *Rossmore House*, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of  
30 questioning by employer agents about union sympathies and activities turned on the question of whether “under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.” The Board in *Rossmore House* noted that the test used by the court in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964), was helpful. The *Bourne* analysis examines the following factors:

- 35 1. The background, i.e., is there a history of employer hostility and discrimination?
- 40 2. The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?

3. The identity of the questioner, i.e., how high was he in the Company hierarchy?
4. Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
5. Truthfulness of the reply.

The first factor concerns whether there is a history of employer hostility to unions or of discrimination against union supporters. In *Shamrock Foods Co.*, JD(SF)-05-16 (Feb. 11, 2016), the Hon. Jeffrey D. Wedekind, Administrative Law Judge, found that the Respondent committed numerous violations of Section 8(a)(3) and (1) of the Act. The General Counsel has moved that I take judicial notice of this decision but, for reasons discussed below, I decline to do so. See *St. Vincent Medical Center*, 338 NLRB 888 (2003) (Board declined to take judicial notice of administrative law judge's decision pending on review).

Although I do not take notice of Judge Wedekind's decision, pending before the Board, it clearly is appropriate to take notice of the Board's published decisions. In *Shamrock Foods Co.*, 337 NLRB 915 (2002), the Board found that the Respondent unlawfully had discharged an employee and also had engaged in unlawful interrogation of employees. Because this conduct took place rather long ago, in 1998, I give it limited weight.

The second *Rossmore House* factor concerns the nature of the information sought. Here, that would appear to be the employee's union or antiunion sentiments. However, the record does not establish that the information was being sought so that disciplinary action could be taken.

The third and fourth *Rossmore House* factors concern the identity of the questioner and the place and method of interrogation. The record indicates that most employees received the shirts at a meeting but it is sketchy concerning the location of the meeting and who spoke. Employee Marvin Woods testified as follows:

Q. BY MS. DEMIROK: Were you ever given any other kind of apparel that you were—you could wear at the warehouse?

A. Yes, ma'am. I came back from my surgery as of June— July 10, 2015.<sup>9</sup> And when I was getting ready to get all my apparel to where I can go back in the warehouse and work around, Leland Scott was the one who issued me an orange

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<sup>9</sup> Woods' further testimony clarified that he actually underwent surgery on July 10, 2015, and returned to work later that month.

shirt. On the back of it, it said, "Shamrock. We care." And he— his exact words were, "You didn't make it to the meeting, so you should try—you should put this on. You basically should wear this."

5

Q. Okay. And where were you when this happened?

A. I was actually upstairs, where the supervisors and the inventory's office combine.

10 Leland Scott is a first-line supervisor rather than a management official. The record does not indicate that Woods was in the office of any management official. For Woods, I conclude that the third and fourth *Rossmore House* factors weigh against finding a violation.

15 Most other employees received their shirts at a meeting but the record reveals little about it. The General Counsel bears the burden of proving that an interrogation was unlawful. In the absence of specific evidence concerning who conducted the meeting at which the shirts were distributed, and where that meeting took place, I conclude that the third and fourth factors weigh against finding a violation.

20 The fifth *Rossmore House* factor, the truthfulness of the reply, appears to be inapplicable. Under the Government's theory, an employee who wore the shirt would thereby reveal opposition to the Union organizing campaign and an employee who declined the shirt would indicate by his conduct that he supported the Union. Accepting this theory for the purpose of analysis, an employee presumably could tell a nonverbal "lie" by wearing the shirt even though he favored the Union. The  
25 present record, however, does not reveal whether any employee actually engaged in such prevarication by attire.

30 Weighing all these factors together, were I to apply a *Rossmore House* analysis to the alleged interrogation, I would conclude that it was not coercive and did not violate the Act. However, for the reasons discussed above, I find that giving the "We Are Shamrock" shirts to employees did not constitute interrogation at all.

### Subparagraph 5(b)(3)

35 Complaint paragraph 5(b) also alleges, in subparagraph 3 that giving the shirts to employees created the impression that Respondent had placed their union activities under surveillance. The General Counsel explained this theory during oral argument:

40 Now, by distributing the orange shirts, orange high visibility shirts with the message "We Are Shamrock" in large, black letters, Respondents [sic] engaged in surveillance of employees' union activities by being able to find out or to see who actually supported the company as opposed to the Union, and created the impression that such

activities were under surveillance. Here, employees would [reasonably] believe that by location of the shirts and the simple fact of wearing the shirts was an obvious signal about who supported the Union, the supervisors were taking note of who was engaging in activity. Thus, employer's conduct likely created the impression of surveillance in violation of Section 8(a)(1) of the Act, and we urge Your Honor to find so.

This argument rests on the premise that an employee who wore the "We Are Shamrock" shirt would thereby reveal whether or not he supported the Union. That premise, in turn, depends on the assumption that employees reasonably would believe that wearing a "We Are Shamrock" shirt made a statement about the employee's sentiments concerning the Union. That assumption, in turn, rests on the further assumption that employees would equate the "We Are Shamrock" shirts with the orange shirts purportedly worn by some employees to signal that they did not want to be solicited to sign an authorization card or support the Union. That further assumption rests on the still further assumptions that there were, in fact, employees who wore orange shirts to signal "don't bother me" and that other employees knew that the shirts carried this meaning.

The Government bears the burden of proof but has not carried that burden. Credible evidence does not establish any of the necessary predicate facts. Therefore, I conclude that the Respondent did not engage in unlawful surveillance by giving employees the "We Are Shamrock" shirts.

In sum, I conclude that the General Counsel has not proven any of the allegations raised in complaint paragraph 5(b). Therefore, I recommend that the Board dismiss these allegations.

#### Complaint Paragraph 5(c)

Paragraph 5(c) of the complaint, as amended, also concerns statements about the orange "We Are Shamrock" shirts which the Respondent distributed to some employees. It alleges that sometime in late July or early August 2015, on the loading dock of its facility, the Respondent, by Floor Captain David Cruz, "by telling employees that the high visibility orange shirts . . . were only for employees who did not support the Union: (1) promised employees benefits if they did not support the Union; and (2) created an impression among its employees that their union activities were under surveillance by Respondent."

The Respondent denies these allegations. It also denies that David Cruz was its supervisor and agent, as alleged in complaint paragraph 4. Further, it denies that it violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 7.

During oral argument, the General Counsel described the Government's theory of violation and the evidence to support it. That argument made clear that the allegation rested on the testimony of employee Kevin Owens:

Now, Your Honor, in regards to paragraph 5C, Dock Captain David Cruz unlawfully told its employees that the shirts were only for employees who did not support the Union. Now, Mr. Kevin Owens testified that—he testified clearly in transcript 661 through 664 that he had gotten tired of hearing rumors that the shirts were for anti-union employees and he decided to go to David Cruz specifically to find out if that rumor was true. When David Cruz confirmed the rumor, he told him, yeah, he also directed him to go to different supervisors to try to find these shirts and ultimately get them to supervisor Leland Scott, who provided him with several of these orange high visibility shirts. Now, it is well established that an employer violates Section 8(a)(1) of the Act by promising or granting benefits during a union campaign in order to dissuade its employees from supporting the Union.

This argument rests on Owens’ testimony, which is quoted above under the heading for complaint subparagraph 5(b)(2). For reasons discussed above, I do not credit Owens’ testimony but rather credit Cruz’ denial that he made such a statement.<sup>10</sup>

In other respects, the record does not support a finding that the Respondent denied a shirt to any employee who requested one. Likewise, the record provides no basis to conclude that Respondent asked any employee about his or her union sentiments before giving that person a shirt. I find that the Respondent gave shirts to all employees who wanted them without regard to the employee’s support or opposition to the Union.

The central allegation in complaint paragraph 5(c) is that the Respondent told employees that the shirts were only available for employees who did not support the Union. Two subparagraphs follow, each of which alleges that the Respondent’s action—telling employees that shirts were only available to employees who did not support the Union—constituted a particular type of violative conduct. Subparagraph 5(c)(1) alleges that this statement was a promise of benefits and subparagraph 5(c)(2) alleges that it created an impression of surveillance.

Clearly, the Government must prove that Respondent told employees that shirts were only available to employees who did not support the Union, as a necessary predicate to the allegations in the two subparagraphs. However, the evidence fails to establish that the Respondent made any such statement. Therefore, I recommend that the Board dismiss complaint paragraph 5(c) in its entirety.

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<sup>10</sup> Even were I to credit Owens’ version, which I do not, it would establish only that Owens asked “are these shirts intended for people that are anti-Union” and Cruz said, “yeah.” That one-word answer hardly amounts to the message described in complaint paragraph 5(c). That complaint paragraph alleges that Cruz told employees that the shirts were *only* for employees who did not support the Union. However, Owens merely asked Cruz if the shirts were for employees who were antiunion, not if the shirts were *only* for such employees. The answer Owens attributed to Cruz, “yeah,” does not amount to a statement that the shirts were exclusively for employees who opposed the Union.

Complaint Paragraph 6(a)

Paragraph 6(a) of the complaint, as amended, alleges that about October 20, 2015, the Respondent changed the manner in which it enforced its modified duty program. The Respondent denies this allegation and the allegation, set forth in complaint paragraph 6(g), that it took such action because its employees had joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 6(h). The Respondent also denies the conclusion in complaint paragraph 8 that, by engaging in the alleged conduct, it violated Section 8(a)(3) and (1) of the Act.

During oral argument, the General Counsel grouped this allegation with those raised in complaint paragraphs 6(b), (e), and (f), stating that they “all relate to Respondent’s unlawful conduct in removing Marvin Woods and Benny Saenz from modified duty and placing Mr. Saenz on extended medical leave.” In standard pleading practice, each complaint paragraph will refer to specific conduct that is different from the conduct described in other complaint paragraphs, or else, if it refers to the same conduct as another paragraph, it will allege some alternate theory of violation. So, it would be reasonable to assume that complaint paragraph 6(a) pertains to some action which is not the subject of complaint paragraphs 6(b), (e), or (f). However, the General Counsel’s argument has not identified any such alleged conduct.

It also would be reasonable to read the language of complaint paragraph 6(a), which alleges a change in the manner of enforcing the extended medical leave policy, as meaning some across-the-board change affecting all employees or at least all employees in a particular group. This sort of change would be proven with evidence showing how the policy had been enforced in the past and other evidence showing some deviation from that practice. However, the Government has not presented this kind of evidence.

A judge should be very careful before concluding that a complaint paragraph merely duplicates other allegations and neither refers to different facts nor to a different legal theory. Yet, that appears to be the case with respect to complaint paragraph 6(a). Therefore, I recommend that the Board dismiss this allegation.

Complaint Paragraph 6(b)

Paragraph 6(b) of the complaint, as amended, alleges that about October 20, 2015, Respondent removed its employee Marvin Woods from its modified duty program, thereby causing a loss of work for Woods. Respondent admits that it removed Woods from the modified duty program but denies that this action caused Woods to lose work.

The Respondent denies that it removed Woods from the modified duty program because he had joined and assisted the Union and engaged in concerted activities, and to discourage employees

from engaging in these activities, as alleged in complaint paragraph 6(g). The Respondent also denies that the removal of Woods from the modified duty program violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraph 8.

Marvin Woods began working for Respondent on August 10, 2013. After working in the inventory department for about a year, he became a loader in the warehouse. After Woods suffered an ankle injury, Respondent placed him on modified duty status as of March 8, 2015. Respondent's employee handbook describes the modified duty program in part as follows:

#### Modified Duty Program

Shamrock values our associates and will make reasonable efforts to accommodate physician-imposed work restriction(s) for associates who are temporarily unable to perform the essential functions of their regular duties, due to a work or nonwork related injury or illness. Remaining active and feeling productive, through an effective modified duty program, has been proven to reduce the recovery period following accidents, enabling the injured person to resume all of their normal activities more quickly.

Modified duty is a limited term assignment, designed to accommodate an associate recovering from an injury or illness. The availability and duration of modified duty assignments will be governed by the needs of the business and decisions regarding specific assignments will be made on a case-by-case basis.

After listing criteria for determining who qualifies, the handbook continues with this description of the duration of modified duty:

Typically, a modified duty assignment will not exceed an aggregate of 90 days, accumulated over a 12-month period from the date of the injury or illness. Should additional modified duty be recommended by a treating physician, a decision on whether to continue to offer such an accommodation will be made after consideration of Shamrock's business needs, the projected, continued duration of the medical restrictions, the overall performance of the individual (e.g. attendance, quality of work, productivity, etc.), the potential impact on the department, and other related issues. Any extension beyond the ninety (90) day period must be approved by Human Resources.

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Although the employee handbook specified that typically, a modified duty assignment would not exceed 90 days in a 12-month period, Woods actually remained on modified duty for more than twice as long. He began the modified duty on March 8, 2015, but did not return to regular duty until October 12, 2015, after his physician lifted the work restrictions.

However, Woods reinjured his ankle on October 15, 2015. The Respondent allowed him to work 3 days on modified duty. Then, a human resources manager notified him that he should not return to work until his status was changed to full duty. This action, not allowing Woods to remain on modified duty, constitutes the alleged violation.

Worker Compensation Claims Manager Jamie Keith made the decision that Woods no longer would be assigned modified duty. Based on my observations as she testified, I conclude that Keith was forthright. Moreover, Keith no longer worked for the Respondent at the time she testified and therefore had little interest in the outcome of this proceeding. Therefore, I credit and rely on her testimony.

The complaint alleged that, during the material time period, Keith was the Respondent's supervisor within the meaning of Section 2(11) of the Act. The Respondent has denied this allegation. However, it is not necessary to resolve the supervisory issue. Keith credibly testified that she made the final decision to remove Woods from modified duty status and no evidence contradicts that testimony. I find that when she made this decision, she was acting as the Respondent's agent.

Keith testified that she decided to remove Woods and another employee, Benny Saenz, from modified duty because "medically, they were not getting better." With respect to Woods, she noted that he had been on modified duty for more than 90 days and then, shortly after returning to full duty, had "reinjured himself." She further explained:

Q. Okay. But you did say that going back to full duty was an indication that he was progressing?

A. Yeah.

Q. In the positive way, right?

A. So that was great to get that full duty release. But then when he was back a day, got reinjured and back to sedentary work only, again, his recovery went backwards instead of forward.

The General Counsel argues that the Respondent refused to allow Woods to stay on modified duty because of Woods' union activities. Woods testified that at times during September and October 2015, he handed out Union flyers in the break rooms at work. He also collected union authorization cards.

However, Keith, who made the decision to end Woods' modified duty, testified that she was unaware that he had engaged in any union activity. For the reasons discussed above, I believe that Keith is a reliable witness. Additionally, no other evidence contradicts her testimony that she did not know about Woods' union activity. Therefore, I credit her testimony.

It is appropriate to analyze these facts using the framework which the Board established in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007).

The General Counsel has established the first element. Woods credibly testified that he passed out union fliers and collected signed union authorization cards.

However, the Government has not proven the second element. The record does not establish that the Respondent knew about Woods' union activity. During oral argument, the General Counsel stated:

Now, Respondent will argue, as it did, it brought up all their low-level supervisors. They all denied knowing about any of the Union activity, any of the individual Union activity in the warehouse. But, Your Honor, it's just not believable. Mr. Vaivao, he's the head of the warehouse, he testified pretty directly on this. When he was asked what he knew about the organizing campaign at the warehouse, he said he knew about it. What did he know about that? He said that he knows that there's guys on the floor that talk about the Union to be unionized. And when asked whether or not he knew who the organizers are, he admitted it. He said he knew this because it's out now, quote and, quote, it's public knowledge now.

Warehouse Operations Manager Vaivao did admit that, at one point, he had received reports about the union organizers. He testified, in part, as follows:

Q. And you know who the organizers are, don't you?

A. Yes.

Q. And you know this because associates, they've told you who's organizing, right?

A. Correct. And it's out now. It's public knowledge now.

However, Vaivao did not name the individuals he believed to be Union organizers and there is no reason to assume that he considered Woods to be an organizer. Here, the General Counsel bears the burden of proving that the Respondent knew about Woods' union activities, not merely that

it knew that some unnamed employees were involved in an organizing campaign. Vaivao's testimony does not establish that he knew about Wood's union activities and the record does not establish that any other supervisor knew about Woods' involvement.

5           Moreover, Vaivao did not make the decision to remove Woods from modified duty. Keith made that decision. She credibly testified that she did not know about Woods' union activities. Therefore, I conclude that the General Counsel has not established the second *Wright Line* element.

10           The Government also has not established the third *Wright Line* factor, the existence of antiunion animus. In seeking to prove animus, the General Counsel argues that I should take notice of Judge Wedekind's decision in another case. As discussed above, Judge Wedekind's decision now is pending before the Board. Because the Board has not yet ruled on it, I do not believe that taking judicial notice of it would be warranted.

15           During oral argument, the General Counsel advanced another reason to take notice of Judge Wedekind's decision. This argument relates to the Government's initial showing under *Wright Line* and, more specifically, what proof of animus suffices. The General Counsel noted that the "General Counsel's burden is not to show that there was particularized animus towards the individual, the employees who are at issue, their union activity or their other protected activity. We need only show  
20           that there is a generalized animus." Up to this point, the argument simply describes Board precedent and raises no eyebrows, but the General Counsel continued as follows: "And, again, that's one of the major factors in why administrative notice should be taken to the prior decision."

25           The government appears to be saying that a "major factor" in favor of noticing Judge Wedekind's decision is the relatively light burden of proof the General Counsel must carry to satisfy the proof-of-animus requirement. The logic of that proposition is not self-evident. It would have been helpful for the Government to have explained why it would be appropriate to consider the General Counsel's *Wright Line* burden in deciding the judicial notice issue.

30           Additionally, if the fire of animus found in a past case continued to burn, there would be at least a flicker of it in the present record. However, in the record before me, I find no manifestation of animus, not even a cinder too spent and cold to ignite discrimination.

35           Yet, the dispositive reason for declining to take notice of Judge Wedekind's decision is that it remains pending before the Board. Taking notice of the prior decision is different from taking notice of a fact, for example, taking notice that the Board has its headquarters in the District of Columbia. People generally agree on such a fact and it is independently verifiable. By comparison, taking notice of another judge's decision is to notice his *findings* of fact, which are based in part on the judge's credibility decisions. While I certainly would have no reason to doubt those findings, I  
40           believe that taking notice of them before the Board has ruled would be both premature and presumptuous. Therefore, I will not.

The General Counsel also argues that I should infer animus from the timing. Woods handed out union flyers in September and early October 2015 and was removed from modified duty around October 20, 2015. However, if anything, the timing of events would support a conclusion that animus did not play a part in the decision.

Woods returned from modified duty to full duty on October 15, 2015, and almost immediately reinjured his ankle. Keith took this reinjury into account when, 4 days later, she decided not to allow Woods to remain on modified duty. Moreover, this decision was fully consistent with the Respondent's established policy of allowing employees 90 days of modified duty in a 12-month period. In 2015, Woods actually had been on modified duty for more than twice as much time.

Because the government has not proven either employer knowledge or animus, I recommend that the Board dismiss the allegations related to complaint paragraph 6(b).

#### Complaint Paragraph 6(c)

Paragraph 6(c) of the complaint, as amended, alleges that about October 22, 2015, Respondent removed its employee Benny Saenz from its modified duty program, thereby causing a loss of work for Saenz. The Respondent admits that it removed Saenz from the modified work program but denies that it caused Saenz to lose work.

The Respondent denies that it removed Saenz from the modified duty program because he had joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 6(g). Additionally, the Respondent denies that its removal of Saenz from the modified work program violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraph 8.

Saenz began working for Respondent, as a warehouse employee, in about July 2010. At some point, he suffered an injury and, as a result, the Respondent placed him on modified duty. However, his testimony concerning when he began modified duty is not entirely clear:

Q. Okay. Now, I want to talk to you a little bit more about working on modified duty. Could you remind us again, when did you first start working on modified duty?

A. I had worked on modified duty as I believe August 20th, 2014.

Q. Okay. And that was in 2014. If it turned out that wasn't the date, would you be surprised?

A. Yeah.

From Saenz' testimony, it is not clear how long this modified duty lasted but examination reports from Saenz' physician<sup>11</sup> indicate that the restrictions continued until October 8, 2015. Additional injuries may have caused the recovery period to be so long. Saenz was in an automobile accident in September 2014.

On July 30, 2015, Saenz remained under medical restrictions<sup>12</sup> when another problem occurred. He testified "I was walking to the restroom and I heard a pop, like a real bad pop, and my knee swelled up. It was like a greenish, purple color." According to Saenz, he went to the doctor the next day. The physician did not change the existing restrictions.

The physician lifted all restrictions and authorized Saenz to return to full duty effective October 8, 2015. However, while at work 12 days later, Saenz suffered another accident, which he described as follows:

I was sitting down like this. There was boxes in front of me. So only way I could move really was moving my feet. So when I moved my feet, my leg had locked. And when it locked, I kind of like fell backwards. It was kind of like—I don't know how to explain it. It was just the chair that I had just slipped underneath me and I fell backwards and hit the floor. The knee hit—the knee hit—my knee had hit the floor and it swelled up.

Saenz reported the accident to a supervisor and then went home. Two days later, he received a telephone call from Respondent's human resources manager, Heather Vines-Bright, who said that he could not return to work on modified duty. Saenz testified:

She told me I would have to stay at home until my restrictions were—they no longer needed my services. And they would have to wait for me to—my restrictions be lifted, and then they would evaluate me. And then they would determine if they had a position for me.

Complaint paragraph 6(c) alleges, and Respondent admits, that it removed Saenz from its modified duty program on October 22, 2015.

On October 21, 2015, Human Resources Manager Daniel Santamaria, Warehouse Manager Jeff Vandawalker, Branch Safety Supervisor Melanie Petrola, and Worker Compensation Claims

<sup>11</sup> These records include physician reports on January 28, 2015, March 31, 2015, May 15, 2015, June 1, 2015, June 3, 2015, and July 17, 2015.

<sup>12</sup> Saenz' description of these restrictions differs from those on the July 17, 2015 Work Status Exam form signed by the physician. Saenz testified his restrictions in effect on July 30, 2015, included no standing, kneeling, bending, walking upstairs, or walking more than 25 yards. However, the doctor's Work Status Exam form does not show any limitation on standing, bending, or walking. The form does prohibit squatting, kneeling and climbing.

Manager Jamie Keith met to discuss whether Saenz and Woods should be allowed to continue on modified duty. However, I do not find that they made a decision at this meeting. Rather, crediting Keith, I find that she made the decision to remove Saenz from that program.

5 In making this decision, Keith focused on Saenz' medical records and concluded that he was not a "good fit" for the modified duty program because he was not getting any better. Saenz' own testimony, when asked about the medical reports during crossBexamination, supports this conclusion. On crossBexamination, Saenz acknowledged that he remained in pain at the time he testified:

10 Q. Okay. And, as you sit here today, you still are not ready to return to full duty?

A. Correct.

15 Q. Okay. But you want to be returned to light duty?

A. Only to show that I'm still able to work.

Q. Okay. When you said you wanted to be back to Shamrock, you mean you want to go book to light duty at Shamrock?

20 A. Some type of work, yes.

Q. Okay. And how long do you think you should stay on light duty?

A. Until they get me fixed.

25 The Government alleges that the Respondent removed Saenz from the modified duty program because of his Union activity. Saenz testified that he signed a union card and that he was "vocal" in supporting the Union. However, Saenz' testimony about being "vocal" was not entirely clear:

30 Q. Got it. Okay. And—and you were vocal about your support from the beginning, correct?

A. No.

35 Q. You were not vocal from the beginning. When—when you were vocal?

A. Well, I was always vocal, we just had to keep really quiet in the beginning.

40 Q. Okay. So you were—you were always vocal—you were all vocal about supporting the Union?

A. Correct.

A literal reading of Saenz' testimony suggests a contradiction, that he was "vocal" while having to keep quiet. However, by "vocal" he may have meant adamant or emphatic, so I do not view this testimony as reflecting on his credibility.

5 Another part of Saenz' testimony, concerning how he sustained a particular injury, does raise some concern. On cross-examination, he first testified that the injury occurred when he jumped over a conveyor belt:

10 Q. Okay. And now you hurt your knee jumping over the belt?  
A. Working.

Q. But you jumped over a belt.  
A. No, I didn't jump over.

15 Respondent's counsel then showed Saenz an "Industrial Injury Investigation Report" on which Saenz had drawn a stick figure diagram depicting how he had been injured. Saenz then testified:

20 Q. You jumped over the belt?  
A. Correct. Like we're supposed to.

25 Thus, when his own drawing forced him to admit that he had jumped over the belt, Saenz took a kind of fallback position that jumping over the belt was accepted procedure. He then repeated this pattern, at first denying that jumping over the belt was a safety violation and then, when pressed, maintaining he had done nothing wrong:

Q. Okay. Got you, got you. You jumped over the belt.  
A. Yes.

30 Q. Okay. Isn't that a safety violation?  
A. No, it's not.

35 Q. There's no policy that says you're not supposed to jump over the belt?  
A. They did an investigation, and I was found not guilty.

40 Q. Okay. That's not my question. There's no policy that says you shouldn't jump over the belt?  
A. Is there a policy?

Q. I'm asking you. Isn't there a policy that you're not supposed

to jump over the belt?

A. Yes.

5 This pattern raises some doubts about Saenz' testimony concerning his protected activity. Saenz might well have exaggerated the extent to which he talked about the Union with other employees. However, even signing a union card constitutes protected activity sufficient to satisfy the first element which the General Counsel must prove under *Wright Line*.

10 For the same reasons discussed above in connection with complaint paragraph 6(b), I conclude that the General Counsel has not proven the second element, employer knowledge. The record does not establish that the decision-maker, Keith, knew about the protected activity.

15 Additionally, for the same reasons discussed above with respect to complaint paragraph 6(b), I conclude that the Government has failed to prove the existence of antiunion animus. The General Counsel must prove all three of the initial *Wright Line* elements before any presumption arises that antiunion animus is a substantial motivating factor in the decision. Therefore, I recommend that the Board dismiss the allegations raised by complaint paragraph 6(c).

20 Complaint Paragraphs 6(d) and (e)

The allegations in complaint paragraphs 6(d) and (e) are closely related, involving the suspension and subsequent discharge of the same employee.

25 Paragraph 6(d) of the complaint, as amended, alleges that about November 30, 2015, the Respondent suspended employee Kevin Owens. The Respondent admits this allegation, further stating "that Mr. Owens was suspended pending investigation." However, the Respondent denies that it suspended Owens because he had joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 6(g). The Respondent also denies that its suspension of Owens violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraph 8.

35 Complaint paragraph 6(e) alleges that the Respondent discharged employee Kevin Owens on about December 4, 2015. The Respondent admits discharging Owens but denies that it did so because Owens had joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 6(g). The Respondent further denies that discharging Owens violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraph 8.

40 In February 2015, the Respondent hired Kevin Owens to work as an order selector in its warehouse. Owens' duties included finding specific items being stored in the warehouse to ship and affixing a barcode to each box.

The Respondent's warehouse depends on a complicated system using 13 miles of conveyor belts under computer control. After a box is placed on a conveyor belt, a barcode reader scans its label to obtain information about the box's intended destination. Then, the computer instructs a switching system to route the box to the proper place.

Serious problems result when a box fails to arrive at its intended loading dock on time. The truck being loaded will make deliveries at a number of stores, so the goods to be taken off at the last stop are loaded on the truck first and the goods to be unloaded at the first stop are placed on the truck last. Loading boxes in this order minimizes the work the truckdriver must do and the time spent at each stop.

Problems can arise which prevent loading the truck in the proper order. For example, if some specified goods cannot be found in time, they will arrive at the dock after the truck is partially loaded. When there is such a delay in finding the merchandise to be shipped, the late arriving boxes are considered "emergency picks" or "e-picks."

Management tries to minimize the number of eBpicks for two reasons. Because the e-picks are loaded on the truck last, the driver must remove them to reach the merchandise to be unloaded and then put them back on the truck before it goes to the next stop. EBpicks therefore cost time and increase the driver's work.

By mistake, eBpicks may be delivered to the wrong location. About 20 percent of e-picks become "lost" enroute. Therefore, e-picks constitute a costly alternative to loading trucks in the proper order.

On about November 22, 2015, Owens suffered a hand cut which required stitches. Three days later, while he was working, one of those stitches ruptured and his hand began to bleed. Owens notified management and went to the warehouse health unit, called MedCor, where a nurse examined his hand. Owens testified that the nurse then recommended to Warehouse Manager Vandawalker that Owens be sent home. Vandawalker agreed.

At this point, Owens had 71 barcode labels which he was to place on boxes before loading them on the conveyor belt. Instead of turning the labels in to supervision so that another employee could use them, Owens threw the labels away. After Owens left, Operations Supervisor Frankie Valenzuela sent him a text message asking what Owens had done with the labels. Owens replied that he had thrown them away.

Valenzuela then sent Owens a text message asking where he had thrown the labels. However, Owens did not answer this message.<sup>13</sup> As a result, new labels had to be generated for the

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<sup>13</sup> Owens testified as follows regarding the exchange of text messages with Supervisor Frankie Valenzuela:

71 boxes, which became e-picks.

At one point during his testimony, Owens claimed that he had thrown away the labels, rather than turn them in to a captain, because he did not want to walk the distance from the MedCor infirmary to where the captain was standing. However, Owens' further testimony made clear that this was not his true reason.<sup>14</sup>

When the computer generates labels, it records the name of the employee to whom the labels are issued. Owens feared that if another employee used his labels, and made mistakes, the mistakes would be attributed to him. This concern caused him to discard the labels and to ignore the text message asking where he had put them. Owens explained, "I figured he would assign those labels to another person . . . So I wadded them up, threw them away, went home."

Owens gave the following explanation for why he did not answer the supervisor's text message asking where he had discarded the labels:

- Q. And why didn't you respond at the end of those text messages?  
 A. If I would have responded to this, they would have went and got my labels and picked with my labels.

Discarding the labels, and failing to disclose their location when the supervisor asked, resulted in the 71 boxes being treated as eBpicks. However, Owens' testimony reveals that he *wanted* the boxes to bear e-pick labels: "Once they print that e-pick label, the label that is under my name is canceled. It won't scan, it won't do anything."

On November 30, 2015, Owens met with Warehouse Operations Manager Vaivao. During this meeting, Vaivao asked Owens more than once about why he threw the labels away. At one point, Owens replied that his hand was bleeding and he didn't want to make a 5 to 7-minute walk back to the dock to give the labels to a captain. However, Owens testified, he also told Vaivao "if I had given these labels to another employee, I would have had mis-picks." In other words, he

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- Q. So what was your response to Frankie when he sent you a text message asking about the 71 labels?  
 A. "They're on the way after I grab what was there." He texted me back, "Why would you throw them away? Why didn't you turn them in?" "Boss, if I handed them in, they were still under my name. Me giving my forks"—that's what we call the stuff that's not there when we go to the location and it's not there —"to people could also be how I'm getting all these mis-picks. I know I'm taking my time and shouldn't have all those. This could be another way I'm getting them. My bad." He text me back, "Where did you throw them? I need to get them so we can pick them." After that, I didn't respond.

<sup>14</sup> This shifting explanation adds to my concerns, discussed above, about Owens' credibility.

believed that employee using the labels would have made mistakes for which he would have been blamed.

5 According to Owens, Vaivao told him that when “I threw the labels away, basically I was abandoning my job.” Vaivao suspended Owens. Later, Owens received word that his employment was terminated.

10 The Government argues that the Respondent discharged Owens because he had engaged in union activities. Owens initially had negative or at best neutral feelings about unionization, but signed a union card given to him by another employee. According to Owens, as he signed the card he saw a supervisor, Leland Scott, walking towards him.

15 Owens did not specifically testify that Scott saw him sign the card but only that he saw Scott walking up at the time he signed the card. Scott denied seeing Owens sign a union card. For reasons discussed above, I have doubts about the reliability of Owens’ testimony. Therefore, I credit Scott's denial.

20 Owens also testified that he stopped wearing “We Are Shamrock” shirts. However, I have concluded that wearing such a shirt did not communicate an antiunion message, so I further conclude that failing to wear the shirt would not communicate a prounion message.

25 Owens further testified that at one point he had a conversation with Cruz, the floor captain, and that during this conversation he told Cruz “the Union gets in here, your captain title will be irrelevant. You'll be just like me.”

For reasons noted above, I have concluded that Cruz was not Respondent’s supervisor within the meaning of Section 2(11) of the Act. Therefore, even if Cruz knew that Owens had changed his mind and now supported the Union, that knowledge would not be imputable to the Respondent.

30 However, Cruz testified that he did not know that Owens engaged in any Union activity. In view of my doubts about Owens’ testimony, to the extent it conflicts with that of Cruz, I credit Cruz. Therefore, I conclude that Cruz did not know about Owens’ support for the Union.

35 The General Counsel has proven that Owens engaged in protected activity, the first of the three elements which the Government initially must prove under *Wright Line*. However, the credited evidence does not establish the second element that the Respondent knew about Owens' protected activity. To the contrary, I conclude that it did not.

40 For reasons discussed above, I further conclude that the government also has not proven the third element, the existence of antiunion animus.

Therefore, I recommend that the Board dismiss the allegations raised by complaint paragraphs 6(d) and (e).

Complaint Paragraph 6(f)

Paragraph 6(f) of the complaint, as amended, concerns Respondent's placing employee Benny Saenz on extended medical leave on January 18, 2016. The Respondent admits placing Saenz on extended medical leave but denies it acted with antiunion motivation and further denies that its action violated Section 8(a)(3) and (1).

From the structure of paragraph 6(f), it is not entirely clear whether the General Counsel is alleging one violation or alleging three related violations. The complaint paragraph states:

About January 18, 2016, Respondent placed Saenz on extended medical leave under the following conditions:

- (1) Saenz will not be guaranteed a return to his former position and must apply to any open position with Respondent for which Saenz qualifies;
- (2) Saenz' group medical insurance will remain in effect for a two-month period, with the associate share of the monthly contribution being deducted from Saenz' pay during that period;
- (3) in the event Saenz is unable to return to employment following the two-month period described above in paragraph 6(f)(2), Saenz' group medical insurance will remain in effect for a period not to exceed a maximum of twelve months inclusive of all leaves, with the entire cost of the monthly contribution being paid by Saenz during that period.

Discrimination in violation of Section 8(a)(3) consists of an adverse employment action which encourages or discourages "membership in any labor organization." See 29 U.S.C. § 158(a)(3). In my view, the language at the beginning of complaint paragraph 6(f) alleges one employment action B placing Saenz on extended medical leave B and the subparagraphs which follow allege how the event was adverse, that is, how it unfavorably affected Saenz' terms and conditions of employment. Therefore, I conclude that complaint paragraph 6(f) alleges one unfair labor practice, not three.

In its answer, the Respondent admits the allegation in subparagraph 6(f)(1), that Saenz would not be guaranteed a return to his former position and must apply for any open position which

he is qualified to perform.<sup>15</sup> The Respondent's answer also admits the allegation in subparagraph 6(f)(2), that Saenz' group medical insurance would remain in effect for a 2-month period, with the associate share of the monthly contribution being deducted from Saenz' pay during that period.

5 However, the Respondent denies the allegation in subparagraph 6(f)(3).<sup>16</sup> Additionally, the Respondent denies that it placed Saenz on extended medical leave because he had joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint subparagraph 6(g). The Respondent also denies that its conduct violated Section 8(a)(1) and (3) of the Act, as alleged in complaint paragraph 8.

10 During oral argument, the General Counsel addressed these allegations together with those raised in complaint paragraph 6(c) and did not point to any additional evidence of employer knowledge or motive not considered in connection with complaint paragraph 6(c). For the reasons discussed above, I have concluded that the Government did not prove that antiunion animus was a motivating factor for the conduct alleged in complaint paragraph 6(c). Similarly, I conclude that the  
15 General Counsel has not carried that burden here.

20 More specifically, the government has not proven that the Respondent knew about Saenz' Union activities. It also has not established the existence of antiunion animus. Therefore, it has not met its initial *Wright Line* burden and no presumption arises that animus played any part in the decision to place Saenz on extended medical leave.

25 It may be noted that the record establishes legitimate business reasons for the decision. Saenz testified on March 18, 2016, exactly 2 months after having been placed on extended medical leave. He testified that he was in less pain than he had previously experienced, but still could not work full duty.

30 Earlier, in October 2015, the Respondent lawfully decided that Saenz no longer could participate in the modified duty program, which involved work less arduous than full duty. Because Saenz still could not perform full duty in January 2016, or even 2 months later, placing him on medical leave appears to have been the only option which maintained his employee status.

35 In sum, I conclude that the Respondent did not violate the Act by the conduct alleged in complaint paragraph 6(f) and recommend that the Board dismiss these allegations.

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<sup>15</sup> Respondent's answer to complaint subpar. 6(f)(1) also states, "by way of further response" that "Mr. Saenz exhausted his Family Medical Leave Act allotment.

<sup>16</sup> Respondent's answer to subparagraph 6(f)(3) states "by way of further response" that "the associate [employee] can continue COBRA coverage for longer than 12 months." The acronym COBRA presumably refers to the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, which pertains to the continuation of employer-based health insurance coverage after the cessation of employment.

**Summary**

The credited evidence does not establish any of the violations alleged in the complaint. Therefore, I recommend that the Board dismiss the complaint in its entirety.

**Conclusions of Law**

1. The Respondent, Shamrock Foods Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

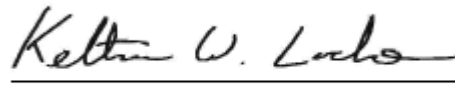
3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended<sup>17</sup>

**ORDER**

The complaint is dismissed.

Dated Washington, D.C. June 10, 2016

  
Keltner W. Locke  
Administrative Law Judge

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<sup>17</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.